

1 RICHARD B. WOLF, SB# 046173
E-Mail: rwolf@lbbslaw.com
2 ELISE D. KLEIN, SB# 111712
E-Mail: klein@lbbslaw.com
3 JANELLE F. GARCHIE, SB# 118453
E-Mail: garchie@lbbslaw.com
4 KRISTIN P. KYLE de BAUTISTA, SB# 221750
E-Mail: kyledebautista@lbbslaw.com
5 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
6 650 West "C" Street, Suite 800
San Diego, California 92101
Telephone: (619) 233-1006
7 Facsimile: (619) 233-8627

8 Attorneys for HEALTH NET OF CALIFORNIA, INC.

9
10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 FRED A SUSSMAN,
13
14 Plaintiff,

15 v.

16 ARMELIA SANI, M.D., SHILEY EYE
CENTER, UCSD MEDICAL CENTER,
17 REGENTS OF THE UNIVERSITY OF
CALIFORNIA, HEALTH NET, INC.,
18 HEALTH NET SENIORITY PLUS,
LINDA BEACH, HAIDEE
19 GUTIERREZ, and DOES 1 through 40,
inclusive,

20 Defendants.
21

CASE NO. 08 CV 0392 H BLM

Honorable Marilyn L. Huff
Action Removed: March 3, 2008

**RESPONSE TO ORDER TO SHOW
CAUSE RE REMOVAL**

22 Health Net of California, Inc. ("Health Net") submits this response to the
23 Court's order that Health Net show cause as to why this action should not be
24 remanded.

25 **I. INTRODUCTION**

26 Health Net removed this action pursuant to 28 U.S.C. § 1441(b) on the ground
27 that this Court has original jurisdiction over the allegations made against it. In fact,
28 as noted in Health Net's motion to dismiss, set for hearing on April 21, 2008, this

1 Court has **exclusive** jurisdiction over the matters plaintiff alleges against it. This is
 2 because plaintiff's causes of action each arise from her challenge to Health Net's
 3 denial of benefits, the **only** remedy for which is an appeal to the district court after a
 4 detailed administrative process is exhausted. To the extent any of plaintiff's causes
 5 of action against Health Net are unrelated to the denial of benefits, they appear to be
 6 related to marketing materials, and, again, plaintiff's exclusive remedy is in this
 7 Court.

8 Because the claims against Health Net are exclusively within this Court's
 9 jurisdiction, and because they are severable from the claims against the providers,
 10 Health Net did not need to obtain the consent of the other defendants to remove the
 11 action. This Court should not remand the claims plaintiff alleges against Health Net.

12 **II. ALLEGATIONS OF THE COMPLAINT**

13 Plaintiff alleges eleven causes of action. The first five causes of action
 14 essentially allege a history of medical malpractice against plaintiff's medical
 15 providers. Health Net is not a party to those causes of action.

16 The sixth cause of action alleges retaliation against plaintiff, in the form of
 17 medical records alterations. Again, Health Net is not a party to that cause of action.

18 The seventh cause of action alleges violation of confidentiality against
 19 plaintiff's health care providers. Health Net is not a party to that cause of action.

20 The eighth cause of action alleges breach of contract and "bad faith insurance
 21 tactics" for Health Net's failure to pay for plaintiff's rehabilitation care. Only Health
 22 Net is a party to that cause of action.

23 The ninth and tenth causes of action allege that through fraud, deceit and
 24 unfair business practices, Health Net induced plaintiff to enroll in its Medicare
 25 Advantage plan. These causes of action are alleged only against Health Net, and not
 26 against any other party.

27 The eleventh cause of action alleges violations of Penal Code section 502,
 28 again, alteration of medical records, against plaintiffs' health care providers, and not

1 against Health Net.

2 None of the eleven causes of action names Health Net together with the
3 provider defendants, and there is no common injury alleged against Health Net and
4 the other defendants.

5 **III. THIS COURT HAS JURISDICTION OVER THE CLAIMS ASSERTED**
6 **AGAINST HEALTH NET, AND THE OTHER DEFENDANTS DID NOT**
7 **NEED TO JOIN IN THE NOTICE OF REMOVAL.**

8 **A. This Court Has Original Jurisdiction Over The Allegations Against**
9 **Health Net**

10 28 U.S.C. section 1441(b) provides:

11 Any civil action of which the district courts have original jurisdiction
12 founded on a claim or right arising under the Constitution, treaties or
13 laws of the United States shall be removable without regard to the
14 citizenship or residence of the parties. Any other such action shall be
15 removable only if none of the parties in interest properly joined and
16 served as defendants is a citizen of the State in which such action is
17 brought.

18 As set forth in Health Net's motion to dismiss, plaintiff's allegations against
19 Health Net arise out of the 2003 amendments to the Social Security Act known as the
20 Medicare Prescription Drug, Improvement, and Modernization Act of 2003
21 ("MMA") (42 U.S.C. § 1395w-26(b)(3)), and the regulations promulgated
22 thereunder. Plaintiff claims that Health Net failed to reimburse her for the cost of her
23 stay in a rehabilitation facility, and claims that Health Net fraudulently induced her
24 to join Health Net's Medicare Advantage ("MA") plan. As set forth in Health Net's
25 motion to dismiss, before a plaintiff may sue a Medicare Advantage ("MA") plan for
26 failure to pay benefits, she must exhaust her administrative remedies. After she
27 exhausts her administrative remedies, either she or the plan may bring an action in
28 **the district court.** (42 U.S.C. §§ 405(g), 1394w- 22(g)(5).)

1 Similarly, to the extent plaintiff believes that Health Net's marketing materials
 2 contained misrepresentations, her remedy is set forth in the federal regulations. (42
 3 C.F.R. § 422.80; 42 C.F.R. § 422.564.) As Health Net pointed out in its reply
 4 memorandum in support of its motion to dismiss, in Masey v. Humana, Inc., 2007
 5 U.S. Dist. LEXIS 70464 (M.D. Fla., 2007), the court held that a MA member's
 6 breach of fiduciary duty and consumer protection claims were "inextricably
 7 intertwined" with what was "in essence" a claim for Medicare benefits, so **all** of
 8 plaintiff's claims had to proceed through the administrative appeal process provided
 9 by the Medicare statute, culminating in an appeal to the district court. The same
 10 result should obtain here.

11 Thus, this Court not only has removal jurisdiction over plaintiff's claims
 12 against Health Net, it also has **exclusive** jurisdiction over these claims.

13 **B. Because This Court Has Exclusive Jurisdiction Over the Claims**
 14 **Plaintiff Asserts Against Health Net, the Medical Provider**
 15 **Defendants Were Not Required to Join in the Notice of Removal**

16 28 U.S.C. section 1441(c) provides:

17 Whenever a separate and independent claim or cause of action within
 18 the jurisdiction conferred by section 1331 of this title is joined with one
 19 or more otherwise nonremovable claims or causes of action, the entire
 20 case may be removed and the district court may determine all issues
 21 therein, or, in its discretion, may remand all matters in which State law
 22 predominates.

23 28 U.S.C. section 1331 provides that "The district courts shall have original
 24 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the
 25 United States."

26 As set forth above and as discussed at length in Health Net's motion to
 27 dismiss, the claims against Health Net arise under the laws of the United States, so
 28 are removable pursuant to 28 U.S.C. section 1441(c). When an action is removed

1 pursuant to that statute, unanimity in removal is not required. As explained in
 2 Bernstein v. Lind-Waldock & Co., 738 F.2d 179, 183 (7th Cir. 1984):

3 Consent is required for removal under 28 U.S.C. § 1441(a), Northern
 4 Illinois Gas Co. v. Airco Industrial Gases, 676 F.2d 270, 272-73 (7th
 5 Cir. 1982), but not for removal under 28 U.S.C. § 1441(c), 1A Moore's
 6 Federal Practice para. 0.168[3.-2-2], at pp. 556-57 (1983) -- that is, not
 7 if the plaintiff's claim against the removing defendant is "separate and
 8 independent" from the other claims in the suit. American Fire &
 9 Casualty Co. v. Finn, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951),
 10 strongly implies that if the claim against Lind-Waldock was pendent to
 11 the claim against the Exchange, or vice versa, this condition could not
 12 be satisfied. However, if the claims were unrelated (or less related),
 13 presumably either party could remove the case without the other's
 14 consent, provided the claim was within the original jurisdiction of the
 15 federal courts. **For if consent were required in such a case, a plaintiff**
 16 **might be able to prevent removal of a federal claim by joining an**
 17 **unrelated claim against a different defendant, and this would reduce**
 18 **the effectiveness of section 1441(c) in making separate and**
 19 **independent claims a basis for removal.**

20 (Emphasis added.)

21 Similarly, in Riggs v. Plaid Pantries, Inc., 233 F.Supp.2d 1260, 1266-1267 (D.
 22 Or. 2001), the court held that where the claims against the removing party are
 23 "separate and independent" from the claims against the other defendants, the consent
 24 of the other defendants need not be obtained as a condition of a valid removal. (See
 25 also Henry v. Independent American Savings Association, 857 F.2d 995, 999 (5th Cir.
 26 1988.)

27 As discussed above, the claims against Health Net are separate and
 28 independent from the claims plaintiff makes against her health care providers.

1 Plaintiff alleges that her health care providers committed medical malpractice, and
 2 falsified her records. She alleges that she was separately harmed by Health Net's
 3 failure to pay for treatment she was contractually entitled to receive, and alleges that
 4 Health Net fraudulently induced her to join its MA plan. The potential liability of
 5 Health Net floats free of the potential liability of plaintiff's medical providers.
 6 Plaintiff thus alleges separate and independent harms. (See, e.g., Riggs v. Plaid
 7 Industries, Inc., supra at 1265 [where claims against removing party are not
 8 contingent on claims against other defendants, claim is separate and independent]; cf.
 9 Emrich v. Touche Ross & Co., 846 F.2d 1190, 1197-1198 (9th Cir. 1988) [RICO
 10 claim not separate and independent because all of the allegations arose from an
 11 interlocked series of transactions].)^{1/}

12 Since the claims against Health Net are unquestionably federal in nature, and
 13 are separate and independent from the claims against plaintiff's medical providers,
 14 Health Net was not required to obtain the providers' consent to removal. Thus, the
 15 claims against Health Net should not be remanded.

17 DATED: April 17, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: 

RICHARD B. WOLF

ELISE D. KLEIN

JANELLE F. GARCHIE

KRISTIN P. KYLE de BAUTISTA

Attorneys for Defendant Health Net of
 California, Inc.

^{1/}Thus, Emrich suggests that removal would have been appropriate under 28 U.S.C. § 1441(c) without the joinder of all defendants had the RICO violations arose out of a separate transaction!

FEDERAL COURT PROOF OF SERVICE
Sussman v. HN - CASE NO. 08 CV 0392 H BLM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

At the time of service, I was over 18 years of age and not a party to the action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On April 17, 2008, I served the following document(s): **RESPONSE TO ORDER TO SHOW CAUSE RE REMOVAL**

I served the documents on the following persons at the following addresses:

Nancy Sussman, Esq.
HAYWORTH & SUSSMAN
1901 First Avenue, Suite 220
San Diego, CA 92101
Tel: (619) 231-1215
Attorneys for Plaintiff, *FREDA SUSSMAN*
kauaiatty@aol.com

Thor O. Emblem, Esq.
LAW OFFICES OF THOR EMBLEM
205 West Fifth Avenue
Suite 105
Escondido, CA 92025
Tel: (760) 738-9301
Attorneys for Plaintiff, *FREDA SUSSMAN*


Lisa Iulianelli, Esq.
CARROLL, KELLY, TROTTER,
FRANZEN & McKENNA
P. O. Box 22636
Long Beach, CA 90801-5636
Attorneys for Defendants, *ARMELIA SANI,*
M.D., SHILEY EYE CENTER UCSD
MEDICAL CENTER, REGENTS OF THE
UNIVERSITY OF CALIFORNIA, LINDA
BEACH, HAIDEE GUTIERREZ

The documents were served by the following means:

- ☒ **(BY U.S. MAIL)** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid, and
- ☒ **(BY COURT'S CM/ECF SYSTEM)** Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the laws of the United States of America that the above is true and correct.

Executed on April 17, 2008, at Los Angeles, California.


Rosa Reza